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COMPARATIVE LAW IN LEGAL EDUCATION

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EVER since the celebrated Roman Committee of Ten for the Enactment of Positive Law, the *decemviri legibus scribendis*, was formed in 450 B.C., and a delegation sent abroad to study foreign legislation, comparative law has been recognized as a useful means of domestic reform. The Committee, so we are told, was established in the course of the long struggle of the plebeians with the patricians in Rome, and its main function, the reduction of the multitude of the scattered legal customs of the early Republic to written form, was among the most important achievements of the common Roman citizenry. This first restatement of the *ius civile*, the common law of the Roman people, as codified in the Twelve Tables, was based upon a thorough study of the laws of Greece, and was the original constitution of a legal system embracing one-half of the Western World, the civil law.

This general receptiveness to adapt foreign customs and laws to domestic needs continued until the nineteenth century when, after the fall of the Napoleonic empire, resurgent nationalism produced its concomitant evils: isolationism, autarchy, and an exaggerated reverence for national institutions, all of these inimical to objective comparison. This same trend was repeated in the United States. Here, nationalism was fostered by the Revolution of the thirteen colonies, and the feeling of splendid isolation, accentuated by the deceptive bulwark of the Atlantic, eclipsed the truly humanistic influence of Kent and Story. Yet, in the relatively short periods of warless prosperity after the industrial revolution, the necessity for international intercourse and exchange of ideas became eminently apparent. This general tendency has naturally been felt also in the domain of law;

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hence the founding of institutes for comparative legal research like the Society of Comparative Legislation in Paris, in 1869, the British Society of Comparative Legislation, in 1894, the Belgian Institute of Comparative Law, in 1907, and the Comparative Law Bureau of the American Bar Association in 1907. This trend scarcely abated between the two world wars, as the multiplication of comparative law institutes in Europe, in the United States, and the Latin-American countries demonstrates. The years since 1945 have evinced an unprecedented need for the creation of institutions capable of furnishing information on certain points of foreign legislation, of placing at the disposal of legal practitioners exact documentation, and of filling the gaps occasioned by the destructions of the war.¹

It is only natural that the increased interest in comparative law should branch out also into the domain of legal education. And it is here, perchance in the most sensitive territory of law, that the shortcomings of the past are most apparent. Taught law is tough law, said Maitland, and the importance of the formation of the thinking and of the approach to the fundamental problems of society of generations of future lawyers is not to be underestimated and indeed is recognized. Significant efforts are being made to reform legal education on national as well as on organized international levels. In Europe, a law for the reform of legal education has been enacted in France;² in Germany, an inquiry was organized by the Gesellschaft für Rechtsvergleichung in 1951, to ascertain the status of comparative law teaching in German universities during the years 1945-1951.³ In the same year, in the United States, the Committee on Comparative Civil Procedure and Practice of the Section of International and Comparative Law of the American Bar Association, distributed a questionnaire among the members of the Association of American Law Schools, to ascertain the availability and nature of the instruction offered in comparative law.⁴ In 1950, UNESCO decided to conduct a general

¹ *Inquiry on the Organization and Purpose of Institutes of Comparative Law*. General Report, presented to the International Committee of Comparative Law during the sessions at Munich, July 28-30, 1954, by Marc Ancel. English translation in 4 AM. J. COMP. L. 248 (1955).

² Dainow, *Revision of Legal Education in France: A Four-Year Law Program*, 7 J. LEGAL ED. 495 (1955); André Tunc, *New Developments in Legal Education in France*, 4 AM. J. COMP. L. 419 (1955).

³ AUBIN & ZWEIGERT, *RECHTSVERGLEICHUNG IM DEUTSCHEN HOCHSCHULUNTERRICHT* (Tübingen, 1952), reviewed in 2 AM. J. COMP. L. 408 (1953).

⁴ Re, *Comparative Law Courses in the Law School Curriculum*, 1 AM. J. COMP. L. 233 (1952).

survey looking to the improvement of methods in teaching social sciences, including law. In 1952, in Cambridge, England, a Symposium on the Teaching of Law was held to evaluate the various national reports submitted to UNESCO, and to point out the merits and inadequacies of legal education as appearing from these reports.⁵ In 1954, the Fourth Conference of Comparative Law, held in Paris, organized a panel discussion on the significance of introducing comparative law in the legal curriculum, in the course of which the latest reports on the problem were exhaustively treated. The present article is devoted to a survey of the results of these various activities.

Without seeking to indulge in criticism and self-criticism to an extreme, it would seem useful, nevertheless, to begin with the negative aspects on which the reports from both sides of the Atlantic are entirely unanimous. These center around the theoretical uncertainty regarding the exact nature and functions of comparative law, and the practical difficulties which stand in the way of introducing regular courses of comparative law in the curricula of the various law schools.

The first source of difficulty is the definition, or rather the imprecise definition, of comparative law. This of course is not surprising in view of the variety of definitions given to law itself, which range from the conception of law as a mere instrument of force in the hands of the strongest social power to its abstract conception as a body of logical norms. Consequently, comparative law has been defined either as an autonomous branch of science,⁶ or the combination of two distinct doctrines, that of comparative legal history and comparative legislation,⁷ while in the majority view comparative law is a method of legal research⁸ applied to various purposes, for instance, the practical

⁵ A detailed analysis of the various national reports has been published by UNESCO in the series, *The University Teaching of Social Sciences*. This report was prepared by Professor Charles Eisenmann of the University of Paris for the International Committee of Comparative Law; in addition to the survey on the organization of law teaching, it contains an excellent analysis of the theoretical problems involved in the teaching of comparative law. EISENMANN, *THE UNIVERSITY TEACHING OF SOCIAL SCIENCES: LAW* (Paris, 1954).

⁶ Cf. Caio Mario da Silva Pereira, *Derecho Comparado, Ciencia Autónoma*, 6 *BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO*, No. 17, p. 9 (1953).

⁷ Lambert, *La fonction du droit comparé*. Procès-verbaux du Congrès de droit comparé de 1900, at 167-170; Saleilles, *Conception et objet de la science du droit comparé*, 29 *BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE* 394 (1899-1900).

⁸ SCHNITZER, *VERGLEICHENDE RECHTSLEHRE* (Basel, 1945), at 3 ff.; GUTTERIDGE, *COMPARATIVE LAW* (Cambridge, 1949) at 10; DAVID, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ* (Paris, 1950) at 4 ff.

aims of the unification of laws,⁹ or analytical research in legal history and sociology.¹⁰

This indeterminacy respecting the nature and functions of comparative law is evident from the replies given in the German and the United States questionnaires to the question: "What courses are offered in comparative law?" In the United States, courses under this heading included Roman Law and Domestic Relations, insofar as the latter covered aspects of Roman Catholic marriage law and the practice before the Diocesan Chancery courts,¹¹ whereas in Germany, courses in *foreign* laws were listed as comparative, but Roman law was excluded from this category. In Germany, furthermore, courses on special topics, as for instance statute law and case law, the legal norm in its relation to members of an association, problems in legal transactions, were classified as comparative. What the authors of the German report consider as the highest form of comparative law teaching, viz., courses which include simultaneous comparison of the current laws of various legal systems without special emphasis on one given law, were offered at fairly irregular intervals and only in a few of the German universities. These were listed as "Introduction to comparative law," and were given either as two-hour credit courses or as two seminar hours per week in each semester. On the other hand, courses in *foreign* laws were more extensively conducted, with special attention to the laws of France, Great Britain, and the United States; the legal system of the latter being the model for democratic constitutional development and principles. Centers of East European laws, especially Russian law, are dependent on the residence of specialists in this field; hence the establishment of Russian institutes in Marburg and in Göttingen.¹²

In the United States, twenty-six of the ninety-seven law schools that received the questionnaire, replied in the affirmative with respect

⁹ Rotondi, *The Proposed Franco-Italian Code of Obligations*, 3 AM. J. COMP. L. 345 (1954). A concise survey of activities in legal unification is offered in *Unification of Law: A General Survey of Work for the Unification of Private Law (Drafts and Conventions) 1947-1952* (Rome, 1954).

¹⁰ Yntema, *Roman Law as the Basis of Comparative Law*, in 2 LAW: A CENTURY OF PROGRESS, 346 (New York, 1937); Smith, *Elements of Law*, in STUDYING LAW, ed. by Arthur T. Vanderbilt (New York, 1955) at 210 ff.; Pound, *Some Thoughts About Comparative Law*, in 1 *Festschrift für Ernst Rabel*, 7 (Tübingen, 1953); *Id.* 1 AM. J. COMP. L. 1 (1952); Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955).

¹¹ See note 4, *supra*, at 237.

¹² See note 3 *supra*.

to carrying courses in comparative law. On the whole, the situation here shows the same characteristics as in Europe; the emphasis is more on information respecting *foreign* laws than on simultaneous comparison of the laws of several countries, while courses in Roman law are figured as comparative. On the other hand, the courses offered cover a wider ground than those in Europe, as a number of schools include courses on the laws of the Latin-American countries. Also, the analytical selection of topics indicates more thorough and expert methods of instruction. Thus, the law schools of Harvard, Columbia, Cornell, Chicago, Louisiana, and Tulane universities offer regular courses and seminars on the following topics: the French legal system, including the organization and administration of justice, the sources of French law, and the basic principles of French law; comparative courses in the institutions of agency, obligations, and real property; introduction to the civil law systems and their judicial administration chosen from topics in the fields of torts, property, bills and notes, and conflict of laws; basic problems in international business transactions and litigation; various seminars in comparative-historical method; in civil-law institutions; and philosophy of law.¹³ In addition, a number of institutes specializing in foreign laws have been established and function regularly, such as the Latin-American institutes of New York University, of Southern Methodist University, and the University of Miami. To these should be added the Comparative Law Institute of New York University.

The variety of topics chosen for teaching comparative law actually does not preclude the introduction of additional regular courses on any topic of comparative interest and use. Practical difficulties, however, impose serious limitations. All the national reports submitted to the Paris Conference are unanimous in their enumeration: an already overcharged curriculum during the entire undergraduate and graduate period, lack of knowledge of foreign languages, a feature especially pointed out in the United States reports, and the absence of foreign literature and reference materials, this latter a serious handicap in Europe. Due to the primary importance of the required basic courses in the undergraduate period, as well as the required specialization on the graduate level, comparative law courses are merely elective. This results naturally in the participa-

¹³ Stevenson, *Comparative and Foreign Law in American Law Schools*, 50 *COL. L. REV.* 613 (1950).

tion of students who desire to avoid undue effort,¹⁴ a desire which is at least halfway met by the courses anyway; as the reports from France, Belgium, and Greece indicate, due to the limited available time, these courses represent merely a superficial introduction to Anglo-American law, or a legal comparison along general lines. The heavy requirements of the regular courses even in the case of candidates for an advanced degree, do not follow an entire year for comparative legal problems.¹⁵

Two reports to the Paris Conference, however, should be treated at some length, because they demonstrate the status of legal instruction in law schools where the introduction of comparative law is beyond the initial stages of experimentation. The first report was submitted by Professor Edward L. Johnson of the University of Durham in Great Britain, the second by Professor W. Friedmann of the University of Toronto.

Professor Johnson points out that in the legal curriculum in England, where Roman law is a required course, the introduction of the method of legal comparison offers no difficulties, not even in the first year of undergraduate studies. Also, the required courses in legal philosophy and private international law during the third year of undergraduate studies offer wide possibilities for comparative legal research. The course in private international law covers the case law of various countries, for instance, that of Great Britain and France, from the viewpoint of the differences in matrimonial regimes, community property, divorce, and nullity, whereas the course in legal philosophy, or jurisprudence, treats the evolution of ideas that led to the different aspects of the fundamental legal conceptions. Here again, however, we find the recurrent observation that these courses are necessarily only slightly beyond the superficial; nevertheless, they are of value to the students as evidencing that the rules and particular institutions of Great Britain are by far neither the best, nor do they offer the only possible solutions.

In the second report, Professor Friedmann takes the same approach to comparative law teaching as his colleague in Great Britain. In Canada, however, a country which, as the saying goes, lies at the crossroads of the two great legal systems, legal comparison, in teach-

¹⁴ Boyer, *Report submitted to the Fourth Conference of Comparative Law* (Paris, 1954).

¹⁵ Cavers, *Report submitted to the Fourth Conference of Comparative Law*, (Paris, 1954).

ing as well as in practice, is facilitated by the constant interaction of the common law and the civil law. This applies especially to Quebec, where, as Professor Friedmann points out, lawyers are more familiar with the common law than their British Canadian colleagues are with the civilian system. Nevertheless, any approach to comparative law in the Canadian scene leads necessarily *in medias res* to everyday legal problems, the treatment of which forms the basis of comparative law teaching. Therefore, instead of giving a historical survey of the various laws, it has proved more effective to use the comparative method in connection with the discussion of certain selected topics through which insight is gained into the structure and the basis of a foreign legal system. For instance, a comparative study of installment selling during periods of monetary inflation, a problem that involves the structure and the concept of contracts in both legal systems, brings forward as a matter of course the importance of the comparative aspects of *causa* and consideration, unjust enrichment, and quasi contracts. Another problem of comparative interest is the difference in the property regimes of the two systems, the central topic being the difference in the conceptions of the institutions of the trust and the *fiducie*. Another subject for comparison is the division of public law and private law in both legal systems, and the various resulting solutions for the protection of individuals.

At the University of Toronto, comparative law is a required course during the third year of the curriculum, which may be taken alternately to public international law. Graduate courses on a more extensive basis are facilitated by the invaluable advantage of having at ready disposal experts of both legal systems; consequently an exchange program has been established between the University of Toronto and the three law schools of Quebec, each program comprising three to five conferences at which the fundamental problems of civil law and common law are discussed. Such problems include the legal development of Quebec in its relation to French law and to the common law; the comparative aspects of immovable property; of the *fiducie*; a comparison between the marriage laws of Quebec and those of the common-law provinces of Canada; the function of precedents, of *stare decisis*; and the place and effects of public law in both systems.

In comparing the results of the two 1951 questionnaires and those of the reports to the 1954 conference, a definite improvement may be observed, and it is at this point that the critical and negativistic as-

pects come to an end. As surveyed in the 1954 reports, the serious efforts of the *hommes de bonne volonté*, who for this purpose should be called legal comparatists, are commencing to produce beneficial results. These are manifested in Europe by a general recognition that the introduction of comparative law courses in the universities is of utmost importance for the general legal culture of the students of law, who in the Western Hemisphere are the collective successors to a common historical and cultural heritage.¹⁶ In the United States, on the other hand, beyond this recognition, practical measures are being taken to reform legal education on the undergraduate level, and to introduce international and comparative aspects in the required courses of the curriculum. The report of Professor David F. Cavers is the most comprehensive description of this trend, and deserves notice as an example of a well-organized effort. The report describes the comparative law curriculum at the Harvard Law School for the academic year 1953-54, during which the courses in comparative law were grouped around three main problems: problems of world order, problems of world economics, and the comparison of legal systems. The courses in the last category included an introductory course to the various civil law systems; a course which gave a comparison between the law of the USSR and that of the United States; and two specialized seminars in constitutional law. Professor Cavers repeats the general observation that participation in these courses is very low, for reasons attributed to the heavy curriculum load at the undergraduate as well as at the graduate level.

The foregoing survey has endeavored to represent the results of a universally felt desire and need to reform the teaching of law. The nature of a descriptive survey, however, does not permit any evaluation of the causes that lie beneath the facts and which bring about the surveyed results. In the present instance, as also was pointed out in the discussions at the Paris conference, the cardinal issue involved is the discouraging lack of enthusiasm shown by students in active participation in comparative legal studies or, as a matter of fact, in any course which transcends national and specialized "bread and butter" interests. This phenomenon is universal and is acknowledged by every "sober observer."¹⁷ It is assumed that an inquiry into this aspect

¹⁶ Gutzwiller, *Rechtsvergleichung in Kontinentaler Sicht*. *Recueil de Travaux Suisses*, IV^e Congrès International de Droit Comparé (Genève, 1954) 3 ff.

¹⁷ Schlesinger, *Teaching Comparative Law: The Reaction of the Customer*, 3 AM. J. COMP. L. 492 (1954).

might be of some use, and as one who has enjoyed the benefits of study in both legal systems, and has had the privilege of close association since its inception with a major venture in comparative law in the United States, the writer may appropriately add a few observations to those already voiced by the more competent.

To discover the causes of the general lack of interest in comparative law, of which the low student participation in comparative law courses is merely an accompanying phenomenon, it will be necessary to probe into deeper recesses than those hitherto explored for the purposes of investigating legal education. This process, however painful, will eventually disclose two determinative issues upon which the solution of the problem hinges. The first concerns the general cultural structure of our society; the second, merely as an outcome of the general pattern, the intellectual attitude of accepting without qualifications and doubts superficial theories of flat generalization. A thorough treatment of these issues would go far beyond the purposes of this article; nevertheless even a surface indication of the problems involved suggests their pertinence to the special issues of legal education.

Education, in any society and any age, reflects the characteristics of both. Examined in this context, the general pattern of our current educational system displays the main attributes distinctive of our culture, regarded as "complex," "industrialized," "mechanized," and of late as "atomic." Transposed into the field of teaching, these attributes mean emphasis on concrete as against abstract science, increasing importance attached to the branches of physical science, and the gradual neglect of social sciences. This trend has led to the consecutive reduction or omission in higher education of classical studies, world history, modern languages, and philosophy; witness the absolute versatility of high school graduates in the intricate problems of driving and repair of motor vehicles, doubtless very useful, and their dismaying ignorance of languages, geography, and history, even those of their own country. In legal education, the manifest results have been the elimination of Roman law, legal history, and legal philosophy, and universal acceptance of the prevalent view that the function of law schools is the training of "social engineers" and "mechanics of law."¹⁸

In the educational scheme at least, the contrast between Europe

¹⁸ Couture, *Report to Universidad Mayor de la Republica, Facultad de Derecho y Ciencias Sociales* (Montevideo, 1955) at 11, 12.

and the United States is sharply focused. In Europe, Roman law has formed the basis of a common legal culture, uniting legal thinking beyond and above geographical boundaries and national codifications, fundamentally unshaken by the totalitarian warfare of arms and ideas. This holds true also of the Latin-American countries, where, until the codes of the middle of the nineteenth century, recourse to Roman law was indispensable, as a guide to the mass of diffusely organized compilations supplemented by countless special laws inherited from colonial times.¹⁹

Moreover, Roman law, as a required topic in the first years of the legal curriculum, involves for the civil-law student a constant historical and analytical comparative training, as the legal bases of his own national institutions are treated as developments from the old Roman principles. Further grounds for comparison are offered by the equally required courses in legal history and legal philosophy, neither of which can be adequately presented in an exclusively national context. Indeed, legal philosophy has been considered of such paramount importance in the formation of thinking that this was the chair first to be occupied by the intellectual exponents of totalitarian regimes. This is also the explanation of the fact that publication of the traditional periodicals in legal history and legal philosophy was resumed at the first opportunity after the termination of the second World War; in the United States, unfortunately, there are no periodicals specifically dedicated to these fields, due to lack of interest and consequently of funds, while the only American periodical in comparative law finds space on the "overcrowded" library shelves of the legal departments of very few firms dealing in international business.²⁰ It must be noted, however, that this attitude has been undergoing considerable change in the last few years as a fortuitous and paradoxical consequence of the atomic age, which, in a contracted world, has imposed on the United States all the burdens and responsibilities of a leading power.²¹

¹⁹ Yntema, *Introduction to Andrés Bello: Derecho Romano*. To appear in the new official edition of BELLO, *OBRAS COMPLETAS*, published by the Venezuelan Government under the editorship of Professor Rafael Caldera.

²⁰ The current discussions on the *Carmen Jones* case, in which the heirs of Bizet by invoking the moral right of the author, oppose the projection of this motion picture in France, serves as an interesting example of the usefulness for legal counsel of information concerning the legislation and jurisprudence of France and other countries in which arrangements are to be made to have an American film displayed. Cf. Roger-Ferdinand, *L'Affaire "Carmen Jones"*, 8 *REVUE INTERNATIONALE DU DROIT D'AUTEUR* 3 (1955) (with English and Spanish translations).

²¹ Conant, *An Old Tradition in a New World*. Address given at the Convocation

Consequently, an increased necessity is felt to master the substantive and procedural aspects of foreign laws, as the diminished space between the nations also contracts the distance separating their courts. It is to be hoped that in the future this necessity will be generally recognized, in which event the market value of the "high-class merchandise" of comparative law will correspondingly increase.²²

The second issue involved, as already indicated, is the easy acceptance of generalizations together with their concomitant fallacies. Mechanization and industrialization are not auspicious for the development of inquisitive minds, and it is simpler to accept a statement than to inquire into its truth, especially if it conforms to the general trend of ideas. This phenomenon is naturally not restricted to the field of law, but will be discussed here merely in its ramifications and bearings on legal education.

In the course of working in comparative law, be it for purposes of legal unification, or more modest efforts to make a foreign legal institution understood and recognized, the position most frequently encountered in writings as well as in personal discussions is the *ab ovo* rejection of the use of legal comparison on account of the basic differences in the two systems that make any attempt to understand or to work with foreign law impracticable and futile. It is a matter of questionable satisfaction that this prejudice is fairly common in both systems, although never shared by comparatists. Hence, the special arguments adduced in support of this prejudice deserve to be treated in some detail. They run as follows:

The unbridgeable chasm between civil law and common law originates in their fundamentally different evolution. Civil law developed from Roman law, hence its strict adherence to abstract theory and logical principles. Common law, on the other hand, untainted by Roman principles and influence, evolved along the flexible lines of judicial precedents through the practical media of decided cases. In the course of its development, civil law eventually rigidified in codes, which, due to the inherent rigor of their construction, put an end to legal reform, whereas the common law, unchecked by codes and guided only by judge-made principles, produced no obstacles to rapid improvement. This flexibility of the common law is enhanced by its

commemorating the One Hundredth Anniversary of the Founding of Michigan State College, East Lansing, Michigan, February 12, 1955.

²² Schlesinger, *op. cit. supra*, note 17, at 492.

unique duplication of law and equity, a feature incomprehensible to civilians, who adhere to a similarly incomprehensible division of civil and commercial law, while on the other hand, a common lawyer will never grasp the intricacies of deductive reasoning necessitated by civil law codes and by the exclusive emphasis of civilians on theoretical principles and their total disregard of actual practice.

To a lawyer who hails from a civil-law country, for instance from Hungary, these arguments seem incomprehensible and even preposterous. Hungary belongs to the civilian system, and although its legal development was strongly influenced by Roman law, the latter was never officially received. Until 1946, Hungary, like England, had no written constitution. Its private law has never been codified, and is based on the common law of the country, collected in 1514, and a compilation of judicial precedents, published in 1800. It might be mentioned in passing that the property regulations of 1514 exhibited greater similarity to those of England in 1914, than to the contemporary Hungarian provisions.

This, however, is merely an isolated example of the legal structure of a single country, and is mentioned only to demonstrate that "civil law" cannot be treated as a homogeneous entity; the laws of each country belonging to its orbit have followed their own independent history. What is, however, the essential feature of the above arguments, is the cavalier disregard of the basic function of law, be it civil or common, namely, the regulation of human behavior, composed of human aims and volitions, which are strangely alike in their ends, as well as in their disregard for the legal system under which they come to pass. The primary factors which condition human behavior are of a social, economic, and political order,²³ for which law provides merely the necessary techniques of realization.²⁴ In this context, it is entirely immaterial whether the doctrines of *causa* or consideration were developed through inductive or deductive reasoning, or the institution of the trust through the circumvention of a Statute of Uses, or in the total absence of statutory provisions through judicial precedents as in France, Germany, and Switzerland. The guiding human motives in these doctrines are nothing but temperate caution regarding gratuitous promises or transactions in which there is no *quid pro quo*,

²³ FRIEDMANN, *LEGAL THEORY* 386 (3d ed., London, 1953).

²⁴ Pringsheim, *The Inner Relationship between English and Roman Law*, 5 *CAMB. L. J.* 347, 359 (1933-35).

in the one case, and in the other, the desire to provide benefits for a third party. It is also immaterial whether the legal technique with which these ends were accomplished developed in the course of time into codified provisions or binding precedents—the final aim to be achieved has always been the same: justice according to law.

It might be argued, naturally, that excursions into the philosophical depths of law are irrelevant to past history and present procedure, and moreover are beyond the needed equipment of teachers employed to train future mechanics of law. Therefore, attention will be concentrated below on the merely factual historical relevance of these arguments, two of which deserve special notice: that the common law has developed without Roman or civilian influence; that the mechanics of legal reform in the two systems—allegedly has been trammelled by rigid codes in the one, facilitated by flexible judicial precedents in the other.

While there might be some exaggeration in Shaw's suggestion that life in England has incurred great losses in not being conquered by Napoleon as well as by Julius Caesar,²⁵ such losses are certainly not traceable in the laws of that country. History proves that there never were and never are any barriers to ideas; from the earliest times, the natural law of Rome, the God-granted rights of Christianity, and the rational reason of enlightenment traversed with equal ease the Channel as well as the Atlantic, from where they rebounded with unparalleled force to influence the democratic formation of the Western World by such constitutional edifices as the Declaration of Independence and the Bill of Rights.

It is also an interesting feature of history, that even the evolution of the civil law and the common law followed analogous channels. In each, when the power of the state was sufficiently developed, the administration of justice was soon professionalized; in each the system of private law became articulated in specific forms of action, and the rigidly formalized scheme of rights had to be supplemented, corrected, and superseded by a parallel system of equitable remedies.²⁶ Both were essentially systems of case law, evolved by specialists generally indifferent to history and with little theory and less philosophy,²⁷ and each has produced an incomparable elementary treatise

²⁵ SHAW, Preface to *The Man of Destiny*. PLAYS PLEASANT (London, 1949).

²⁶ Yntema, *Roman Law and Its Influence on Western Civilization*, 35 CORNELL L. Q. 77, 78 (1949).

²⁷ *Id.* at 78.

of eminent influence, two works of inspired journalism, simple, clean, and persuasive, the Institutes of Gaius and the Commentaries of Blackstone.²⁸ In both systems, extra-legal magistrates exercised important law-creating functions, but while the Roman praetor's *aequitas* became absorbed in the course of time in the statutory enactments of civil law, the British chancellor's equity continued its existence as a supplementary body of flexible rules, applied by discretionary judicial power, which, however, as time went on became, in many instances, more rigid than the rules which it intended to modify.²⁹

Also, this analogy in development, due to the basic resemblance of two nations, both capable of and destined to create an empire, accounts for their parallel legal institutions. Suffice it to point to the similarity between the Roman praedial servitudes and the common law easements, the *fiducia* and the trust, the *heres* and the executor, and the various regulations on subrogation.³⁰ The Roman origins of the law merchant, the maritime and admiralty laws are too well-known to be treated at length. In addition, the influence of civil law on judicial thinking is also apparent. Lord Mansfield, for instance, was much criticized for his perpetual resort to Roman law and to the opinion of civilians in cases involving partnerships, commercial organizations, and sales,³¹—but he was a Scotchman. From the beginning of the nineteenth century, however, civilian authorities were frequently cited, and although the voice of Justinian would not be heard in British courts more than once as against a thousand cases, and arguments of counsel based exclusively on the Digest might have occasioned depression, if not a certain irritation on the Bench,³² civil law was often resorted to in "investigating the principles on which the law is grounded."³³

²⁸ BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW*, 22 (2d Rev. Ed. by F. H. Lawson, Cambridge, 1952).

²⁹ ALLEN, *LAW AND DISORDERS*, 154 (London, 1954); DENNING, *THE NEED FOR A NEW EQUITY, CURRENT LEGAL PROBLEMS*, 1953, 1 ff. (London, 1952).

³⁰ BUCKLAND, *EQUITY IN ROMAN LAW* (London, 1911).

³¹ Colvin, *The Path of the Civil Law in the United States*, GENERAL REPORT, MÉMOIRES DE L'ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ, 115 (Paris, 1934); ALLEN, *op. cit. supra* note 29, at 204.

³² ALLEN, *LAW IN THE MAKING*, 255 (5th ed. Oxford, 1951).

³³ Blackburn, J., in *Taylor v. Caldwell*, 3 B. & S. 826 (1863). This judgment began a series of modern cases that restricted the severe principle of British contract law known as the rule of *Paradine v. Jane*, Aleyn Rep. 26 (1647).

The leading British decision on the foreseeability of damages, *Hadley v. Baxendale*, 9 Exch. 341 (1854) relied on the French Civil Code, and was followed in the United States in the New York case of *Griffin v. Colver*, 16 N. Y. 489 (1871). Cf. SEDGWICK, *MEASURE OF DAMAGES*, 204 (8th Ed., New York, 1891).

This was also the case in the United States. Here, the wall built by the Dutch governor of Manhattan for the purpose of keeping the British settlers without, crumbled as early as 1653,³⁴ and in giving way to Wall Street, gave way at the same time to the British rights "to such parts of laws of the land as they should judge advantageous," and "to make such others as they should think necessary, not infringing the general rights of Englishmen."³⁵ Thus, the "pure derivative of the pure common law," was formed into shape in the colonies by the laws and customs of French, Dutch, and British colonists, and by concepts transplanted from Roman equity, Dutch internationalism, British empiricism, and French reason, until it became in its final form—if ever law may be called final—the law of the United States.

This process is also reflected in a long series of cases,³⁶ in which the judgments relied successively on the custom of Paris, on Roman-Dutch law, and the French Civil Code,³⁷ a practice which extends into our days as a late judgment of the New Jersey Supreme Court also demonstrates.³⁸

Finally, there is the other argument to consider, that the methods of legal reform are determined in civil-law countries by the autocratic impositions of the codes, while in common-law countries reform is facilitated by the supple nature of judicial precedents. It might also be apposite in this context to deal with the alleged absence of equity in civil law. The abundance of the available material necessitates the selection of a few outstanding examples, which may serve to demonstrate that the broad power of the judges in civil-law countries to adapt existing code provisions to ends which were unknown to the drafters of the codes, is quite analogous to the functions of the judges in common law to bring new cases within the scope of established precedents.

³⁴ Colvin, *op. cit. supra*, note 31 at 134.

³⁵ Franklin, *State of the Constitution of the Colonies (1769)* in 4 FRANKLIN, WORKS, 300-301 (Bigelow Ed., 1887). Cf. Radin, *The Rivalry of Common-Law and Civil-Law Ideas in the American Colonies*, in 2 LAW: A CENTURY OF PROGRESS, 404, 419 (New York, 1937).

³⁶ Pound, *The Influence of French Law in America*, 3 ILL. L. REV. 8 (1920); Colvin, *op. cit. supra*, note 31 at 162.

³⁷ Among the cases which illustrate this trend are: *Lorman v. Benson*, 8 Mich. 18 (1860), *Kaskaskia v. McClure*, 167 Ill. 23, 47 N. E. 72 (1897), *Coburn v. Harvey*, 18 Wis. 156 (1864), *Snedeker v. Waring*, 12 N. Y. 170 (1854), *Dunham v. Williams*, 37 N. Y. 251 (1867), *Van Giesen v. Bridgeford*, 18 Hun. 73, 83 N. Y. 348 (1881), *Brumsby v. N. Y. & N. C. Ry. Co.*, 133 N. Y. 79 (1882).

³⁸ *Vanderbilt*, C. J. in *Greenspan v. Slate*, 12 N. J. 426, 97 A. 2d 390 (1953).

Thus, in the field of property, the common law trust was introduced by judicial precedents in France and in Switzerland, while in Germany, this same process led to the enactment of trust statutes, doubtless facilitated by Anglo-American occupation, in the course of which it became evident that the trust concept is the most effective way to manage the properties of absentee owners.³⁹ In the field of contracts, the introduction of the equitable remedy of specific performance,⁴⁰ as well as the elaboration of the theory of the remoteness of damage⁴¹ was incumbent on the courts, as the scant provisions of the codes offered no guidance for the large number of newly emerging problems. Similarly, the insufficiency of code provisions applicable to the complex branch of torts, gave rise to a veritable edifice of judge-made law, conspicuously exemplified by recent developments in France and in Germany in such specialized branches as unfair trade⁴² and civil liability.⁴³ As a reason for vindicating the importance of legal comparison, it should be mentioned, that in the last instance the doctrinal discussions relating to responsibility without fault demonstrate the similarity of ideas in both legal systems in developing the notions of Act of God, unreasonable risk, and absolute nuisance.⁴⁴

The above discussion has not ventured to emphasize that the individual institutions of the civil law and the common law are identical. The two legal systems have developed under various climates of history and have been conditioned by different social and economic forces; these, in turn, have produced different modes of thought and different techniques for the realization of various social ends. What the above discussion, however, may serve to prove is the futility of exaggerated insistence on such differences, temporal and transient, if contrasted with the invariable and essential function of law. And it is in this context that comparisons may be made. This function, as has been stated above, is to provide a suitable framework within which human activity may most effectively operate. Whether this framework

³⁹ Bolgár, *Why No Trusts in the Civil Law?* 2 AM. J. COMP. L. 204 (1953).

⁴⁰ Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208 (1955).

⁴¹ Kahn-Freund, *Remoteness of Damage in German Law*, 50 L. Q. REV. 512 (1934).

⁴² Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 AM. J. COMP. L. 1 (1955).

⁴³ LAWSON, *NEGLIGENCE IN THE CIVIL LAW*, 44 (Oxford, 1950); Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. L. 156 (1953).

⁴⁴ PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS*, 135 (Ann Arbor, 1953).

is stated in codes or in precedents, its amendment and expansion is achieved by the combined efforts of legislatures and courts,⁴⁵ drawing on principles of justice and equity and, if necessary, on foreign examples in which these principles have successfully been applied. Consequently, legal education should not dwell on differences in technique and thought. Beyond the practical training, whether inculcated by the case method, which helps future members of the Bench and Bar to cite in due form a volume of antiquated precedents,⁴⁶ and to write volumes of opinions conscious of the shadows of eternity cast by stare decisis or at least by future casebooks, or by the magistral method of lecturing *ex cathedra* that neglects practice altogether, law schools should endeavor to adapt their teaching to the felt necessities of their time, which include the interests of a larger community than the one resident within their national borders.

⁴⁵ For a concise comparative summary of legislative and judicial interaction, see Pound, *The Judicial Process in Action*, 1 N. Y. L. F. 11 (1955); for a comparison of the working of judicial review in Switzerland and the United States, see Schindler, RICHTERLICHES PRÜFUNGSRECHT UND POLITISCHER MEHRHEITSWILLE-ERFAHRUNGEN DER VEREINIGTEN STAATEN—FOLGERUNGEN FÜR DIE SCHWEIZ, 74 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 290, N. F. Heft 4/5 (1955). On the increasing significance of legislation in the improvement of the legal system, cf. Goodhart, *Precedent in English and Continental Law*, 50 L. Q. REV. 40 (1934); FRIEDMANN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN*, 237 (London, 1951).

⁴⁶ For instance, in *Bottomley v. Bannister*, [1923] 1 K. B. 458, precedents decided in 1409 and 1425 were cited to assist the judge in determining who was liable for the leakage of a gas burner in 1929; in *Bremer Oeltransport G. M. B. H. v. Drewry*, [1933] 1 K. B. 753, the learned Judge discussed cases decided in 1670, 1704, 1805, 1818, 1855, and 1866 (A. L. Goodhart, *op. cit. supra*, note 45, at 49, 51); while Cardozo applied the horse-and-buggy messenger days doctrine of *Hadley v. Baxendale* to the erroneous transmission of a transatlantic cable message in *Kerr S.S. Co. v. Radio Corp. of America*, 245 N. Y. 284, 157 N. E. 140 (1927).